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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
Before The Honorable Thomas S. Hixson, Magistrate Judge

KOVALENKO,)
)
Plaintiff,)
)
vs.) No. C 22-05990-HSG
)
KIRKLAND AND ELLIS, LLP,)
)
Defendant.)
)

Oakland, California
Thursday, February 15, 2024

TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND
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1 Thursday, February 15, 2024

10:08 p.m.

2 P-R-O-C-E-E-D-I-N-G-S

3 --oOo--

4 THE CLERK: Okay, everyone. Good morning. We are
5 here in Civil Action 22-5990, Kovalenko versus Kirkland and
6 Ellis, LLP, et al. The Honorable Thomas S. Hixson
7 presiding.

8 Counsel, please state your appearances for the record.
9 Let's start with Plaintiff's counsel.

10 MR. RAHMAN: Good morning. For the Plaintiff,
11 this is Tanvir Rahman of Filippatos, PLLC.

12 THE COURT: Good morning.

13 MR. RAHMAN: Good morning.

14 MR. LIBURT: And good morning, your Honor. For
15 the Defendants, Kirkland and Ellis, LLP, as well as the
16 remaining individual Defendants and remaining PC's, Joe
17 Liburt on behalf of all of them.

18 THE COURT: Good morning.

19 MS. JUVINALL: Good morning, your Honor. This is
20 Kate Juvinal from Orrick on behalf of the Defendants as
21 well.

22 THE COURT: Good morning.

23 THE CLERK: And, Judge, I have two reporters on
24 the line listing as well.

25 THE COURT: Okay. Thank you for letting me know.

1 Before we turn to the subpoena, I have a question about
2 the overall state of discovery in this matter. The
3 subpoenas are directed to Plaintiff's former employers.
4 They won't have information about what happened during
5 Plaintiff's employment at Kirkland and Ellis or whether she
6 performed well or poorly at Kirkland or whether there was
7 discrimination or retaliation at Kirkland, and what I didn't
8 get a sense from the parties is the state of discovery into
9 the core relevant allegations, namely, what happened at
10 Kirkland and the firm's reasons for its actions or whether
11 there are disputes about those actions. And maybe the
12 reason why I didn't get a sense of that is just because the
13 parties didn't brief it because the briefing was about the
14 subpoenas. But I want to make sure that the focus of
15 discovery is in the correct place.

16 So, let me first turn to defense counsel. Can you give
17 me an update on Kirkland's discovery efforts focused on the
18 events that happened at Kirkland?

19 MR. LIBURT: Yes, your Honor. We have propounded
20 document requests. We have not gotten back anything that
21 really relates to the core allegations in -- in the lawsuit.
22 No depositions have been taken yet. We have -- there's a --
23 a motion to dismiss that is pending before Judge Gilliam
24 that addresses many of the claims in the case, but in terms
25 of discovery, what the Defendants have done is one round of

1 -- one -- one set of requests for documents which basically
2 for the most part tracks the allegations in the complaint
3 with some additional categories and these two prior employer
4 subpoenas.

5 THE COURT: I see. And I think you attached the
6 Plaintiff's discovery responses to your opposition brief
7 indicating --

8 MR. LIBURT: Yes.

9 THE COURT: -- that she had declined to produce
10 anything. Is that correct?

11 MR. LIBURT: Yes, that's correct.

12 THE COURT: And are you planning to raise that
13 issue in a joint discovery letter brief?

14 MR. LIBURT: Yes, we are.

15 THE COURT: I see. Well, then let me turn to
16 Plaintiff's counsel.

17 What discovery have you taken or attempted to take
18 about the core allegations concerning the Plaintiff's time
19 at Kirkland?

20 MR. RAHMAN: Your Honor, as you might know, you
21 know, my firm somewhat recently, you know, was retained on
22 this matter, a couple of months ago. And since then, we've
23 -- you know, we've had to -- to oppose the motion to dismiss
24 that the Defendant just mentioned, and we had to brief this
25 motion to compel.

1 But, in short, you know, we've been working on -- we've
2 met and conferred with opposing counsel on -- on
3 Plaintiff's, you know, responses for at the time pro se. We
4 are in the midst of propounding our own requests and
5 interrogatories which we intend to issue in the next week or
6 so, but we haven't I guess formally taken any -- or worked
7 with any -- any offensive discovery. Again, I've been --
8 I've been trying to catch up on the matter. I know there
9 were -- quite a bit of discovery responses were propounded.
10 I'm trying to get -- get ahold of sort of what's been
11 produced and what hasn't been produced.

12 There has been some production. So, I'm not quite sure
13 why defense counsel is saying there's been no production.
14 There has been some production. But there's obviously going
15 to be more production. We're not -- we're not saying that
16 that was it. So, I'm trying to work with my clients on --
17 on seeing what's -- what's out there, what she has, what we
18 need to produce and also what we need to request from the
19 Defendants.

20 THE COURT: I see. Well, I appreciate the update
21 from both sides. I guess that still leaves me wondering why
22 there's a major discovery fight about prior employment
23 records which are at best marginally relevant, yet there
24 seems to have been very little discovery into the core
25 allegations that seem to be most relevant to this case.

1 But, in any event, we can turn to the subpoenas to Fish
2 and to Paul Hastings.

3 Let me pose a question to Kirkland. Category one --
4 there were six categories, document categories, in the
5 subpoenas. Category one looks very broad. It's -- it
6 includes things like garnishment notices or her letter
7 accepting a job offer or interview notes and applicant
8 evaluations, which presumably would be favorable to her
9 because they both gave her a job.

10 Why would things like garnishment notices or offer
11 letters or acceptance letters or interview notes or
12 applicant evaluations, why would those be relevant?

13 MR. LIBURT: Well, your Honor, those -- those -- I
14 can certainly address category one at some length. I was
15 actually planning to focus my -- my comments on that, but
16 specifically, those things go to the terms and conditions of
17 her prior employment. They go specifically to things like
18 what was -- what was the job that she had there. So, for
19 example, Kirkland hired her as an IP litigation associate,
20 but she didn't spend all of her time in -- at Fish and at
21 Paul Hastings doing IP litigation. She spent a significant
22 portion of her time doing things in front of the U.S. Patent
23 Office and doing something different. I'm not saying all of
24 it was, but there is a significant portion that didn't
25 overlap with what she was being hired to do.

1 And, so, because Plaintiff has specifically alleged in
2 the complaint that it was discriminatory based on her gender
3 to place her in the Class of 2017 rather than 2016, among
4 other things, these types of documents are relevant to
5 showing, well, what was she hired to do and what did she
6 actually do at these prior employers, and that -- that
7 relates to legitimate reasons why Kirkland placed her in the
8 Class of 2017 rather than 2016 as opposed to her claim that
9 it was because of her gender.

10 So, and the -- you know, the interview notes and
11 evaluations from prior employers, again, also go to what
12 representations was she making to them about her experience.
13 As -- as you'll read -- as you read the complaint in this
14 case, there -- the complaint has -- extensively has -- has
15 extensive allegations comparing the Plaintiff's
16 qualifications and performance to what she characterizes as
17 comparator male associates at Kirkland. And, so, the -- the
18 -- the documents from prior employers that are relevant to
19 showing, well, what were her qualifications, what was her
20 experience, what was her performance, et cetera, are
21 directly relevant to her claim that she was more qualified
22 than and had better experience than the male associates at
23 Kirkland that she is expressly comparing herself to.

24 So, I -- I can -- if you'd like, I can certainly
25 address more broadly subpoena category one or as you wish,

1 your Honor.

2 THE COURT: Okay. Well, why don't you go ahead
3 and do that. And, in particular, my concern is that
4 documents that Kirkland wasn't aware of and that Kirkland
5 still isn't aware of couldn't have provided -- been any
6 basis for its decision about what class to put her in or how
7 -- or what else to do. The firm could only have acted based
8 on information that was known to it.

9 So, it sounds like you've got some remarks you would
10 like to make about category number one. So, why don't you
11 go ahead and do that, and if you can make sure to address my
12 concern in the course of remarks, that would be helpful.

13 MR. LIBURT: I would be happy to do that, your
14 Honor. Thank you.

15 So, as to category one, so -- so, as noted, so, before
16 Kirkland, Plaintiff worked at Fish and Richardson for less
17 than two years and at Paul Hastings for two years. She came
18 to Kirkland as a mid-level IP litigation associated and was
19 terminated for -- for poor performance less than a year
20 later.

21 The performance issues that Kirkland noted were varied,
22 but they included writing, analysis, judgment, difficulty
23 communicating her analysis, substantial rewriting of work
24 product, time management issues, inability to meet
25 deadlines, preparation, unusual hours, and -- and more.

1 Plaintiff -- now, Plaintiff disputes all of this,
2 including the reason for her termination. And, so, the --
3 the former employer subpoenas seek documents that are
4 directly relevant both to Plaintiff's claims and Kirkland's
5 defenses. While we have cited in our opposition cases that
6 say generally this -- personnel file documents are
7 discoverable in this type of case, there are many specific
8 reasons why the subpoenaed documents are directly relevant
9 to the claims and defenses here that go beyond a general
10 proposition.

11 So, first, as to her discrimination, retaliation, and
12 harassment claims, the subpoenaed documents from her two
13 recent prior employers are relevant. Plaintiff has placed
14 in issue her skills, experience, and performance. Her
15 performance evaluation and termination documents from recent
16 prior employers will reflect the types of work she performed
17 and her skills, experience, and performance.

18 Moreover, any specific criticisms of Plaintiff's
19 performance at prior recent employers are relevant to
20 specific criticisms from Kirkland, again, whether Kirkland
21 knew about it or not.

22 For example, if her prior employers commented on poor
23 writing, poor analysis, poor judgment, not meeting
24 deadlines, unreliability, et cetera, that's directly
25 relevant to similar criticisms from Kirkland. The

1 applicable law for the discrimination and retaliation claims
2 means that Plaintiff is necessarily alleging that Kirkland's
3 stated reason for her termination, poor performance, was a
4 pretext and that discrimination and retaliation were the
5 real reasons.

6 But prior recent employers, having made similar
7 criticisms of her performance and/or terminated her poor
8 performance, is -- is probative of a central issue in this
9 case. What was Kirkland's reason for terminating her.

10 Similarly, if Plaintiff's two recent prior employers
11 noted her unusual behavior, such as working strange hours,
12 being unreachable or disappearing during a trial, that would
13 be relevant to Kirkland's observations of the same or
14 similar issues. And, again, she alleges she was more
15 qualified than specific male Kirkland associates whom she
16 discusses at length in her complaint. Her work history and
17 experience, including her performance in termination
18 documents, are directly relevant to her qualifications, and
19 in comparison to male associates that she's alleging are
20 comparators.

21 Regarding her Equal Pay Act claim, her skills, effort,
22 and responsibilities at prior employers are squarely
23 relevant, again, including the allegation that Kirkland
24 discriminated against her by hiring her as a 2017 rather
25 than 2016 class member.

1 As I mentioned, and I won't repeat it, but it's a
2 legitimate reason if her work experience, as we believe, was
3 not entirely congruent for all of those four years with what
4 Kirkland was hiring her to do. So, that's a legitimate
5 reason.

6 The complaint tries at some length to compare
7 Plaintiffs to several male associates, and she specifically
8 alleges that she and those male associates' jobs "involved
9 similar levels of skill, i.e., similar levels of experience,
10 ability, education and training". That's paragraph 63 of
11 the amended complaint.

12 Since Plaintiff is comparing herself to other fourth or
13 fifth-year associates in these respects, she can't prove and
14 Kirkland cannot fairly defend her allegations of similar
15 skill, experience, ability and training without obtaining
16 discovery of that from her first two employers covering her
17 first four years as an attorney before coming to Kirkland.

18 The subpoenaed documents are directly relevant to
19 showing whether she had similar levels of skill, experience,
20 ability and training as these male associates and are
21 plainly relevant to her claims of disparate treatment in
22 various respects.

23 THE COURT: But for the male comparators, unless
24 you subpoena their prior employers, Kirkland wouldn't have
25 similar information about what they did before the came to

1 -- to Kirkland. And I guess I'm still struggling with his
2 question of whether Kirkland treated her fairly or unfairly
3 as compared to male employees would seem to depend on what
4 the firm knew about her and the male comparators. The firm
5 didn't have any of this information about her prior
6 employers. Nor did her firm have information about the male
7 comparators at their prior firms, if there were any prior
8 firms.

9 So, it would seem like the discrimination claim would
10 have to hinge on information that was known to Kirkland.
11 So, maybe you could speak to that issue.

12 MR. LIBURT: Yes. Well, for many of the male
13 associates, they -- they started at Kirkland. So, there
14 aren't any prior employers. I can't -- I can't say that
15 that's true for all of them, but I believe for most of them
16 that's the case. But it -- where -- Kirkland is not limited
17 to what it knew because it's -- it's in -- the law regarding
18 an Equal Pay Act claim, a foundational -- a foundation that
19 Plaintiff needs to establish, and it's her burden to
20 establish that -- that these comparators did have similar
21 skills, efforts, and -- and responsibility. And that's just
22 part of the claim. And she was -- she was only working at
23 Kirkland for seven months. She was -- she was terminated
24 after 10, but three of that was on a Bar leave. So, she had
25 about seven months of actual work there.

1 And, so, it's -- you know, Kirkland -- their -- the
2 central dispute is Plaintiff saying she wonderful and her
3 performance was excellent, as she says in her complaint
4 repeatedly. Kirkland disagrees with that assessment.

5 Plaintiff has the burden of showing that she had
6 similar skills, experience, et cetera, with these other
7 associates. Well, the only way that Kirkland can reliably
8 find out what she was doing for the first four years of her
9 career as a lawyer is to get that from prior employers.
10 And, so, it doesn't -- it doesn't matter that Kirkland
11 didn't know it at the time. It's -- it's necessary to the
12 -- the claims that she is bringing and to Kirkland's ability
13 to fairly have the fair and due process consistent
14 opportunity to defend itself to have discovery of matters
15 that bear on her burden and on Kirkland's defenses, whether
16 -- whether it knew it or not.

17 This is not a unique -- it's not a unique situation
18 where a Defendant is entitled to discovery of things that it
19 didn't know at the time. For example, I mean, there was all
20 kinds of things that defendants get discovery of, for
21 example, medical and psychological information. But the
22 mere fact that it doesn't know certain things is -- does not
23 mean that it can't -- it's not entitled to discovery of it.

24 If I may address the -- in relation to category one,
25 the defamation claim, the -- these personnel file documents

1 are directly relevant to that claim. Plaintiff has
2 specifically alleged that Defendants damaged her
3 professional reputation by publishing statements regarding
4 her performance and their evaluations. As noted in our
5 brief, she's also seeking reputational damages on her
6 discrimination, retaliation and harassment claims.

7 But she alleges that Kirkland's evaluations of her
8 performance were "tantamount to an assassination on
9 Plaintiff's professional reputation and livelihood." That's
10 paragraph 13 of her complaint. Whether Plaintiff
11 experienced similar assassinations from her prior employers
12 is directly relevant to her claim that Kirkland harmed her
13 professional reputation and livelihood.

14 Evidence of Plaintiff's preexisting professional
15 reputation is necessary to assess whether anything Kirkland
16 did harmed her professional reputation. And the most
17 relevant documents --

18 THE COURT: Let me ask you about that. When she
19 applies to other law firms for jobs and she alleges that she
20 has been unable to get an interview, those -- those other
21 firms aren't going to know what's in her personnel records
22 at Fisher, Paul Hastings because the records are
23 confidential.

24 So, how would confidential personnel records that the
25 firms are declining to turn over to you in discovery be

1 evidence of her professional reputation if people don't know
2 about them?

3 MR. LIBURT: Well, because as a junior and mid-
4 level associate, Plaintiff's professional reputation is
5 mainly with her prior firms, and her prior firms are aware
6 of her performance. So -- so, she's claiming that Kirkland
7 is harming her reputation and that she has an excellent
8 reputation. So, Kirkland is entitled to discovery of, Well,
9 what is her professional reputation with her prior firms,
10 which are the -- part of the legal profession that is
11 plainly most likely to be aware of what her profession is,
12 because they're the ones who employed her and evaluated her.

13 So, the most relevant documents bearing on her
14 preexisting professional reputation are from her two prior
15 employers, and that would be most obviously performance
16 evaluation documents and termination documents.

17 THE COURT: Is your theory of causation that when
18 she applies to a new law firm, that firm will call up Fish
19 or Paul Hastings and will say --

20 UNIDENTIFIED SPEAKER: Judge --

21 THE COURT: -- and will say they're evaluating
22 the --

23 UNIDENTIFIED SPEAKER: We can barely hear you,
24 Judge.

25 THE COURT: Oh, sorry. Is that any better?

1 UNIDENTIFIED SPEAKER: A little bit.

2 THE COURT: Is the idea that when she applies to a
3 new law firm for a job, that the new law firm would call up
4 Fish or Paul Hastings and say, you know, is she any good?
5 And they would provide the new firm information from her
6 personnel file?

7 MR. LIBURT: I -- oh, I don't know if they would
8 do that or not, but it doesn't -- it doesn't -- it doesn't
9 matter whether that's what would happen because she's
10 claiming in this case that -- that she has an excellent
11 professional reputation, and Kirkland is entitled to test
12 that by obtaining discovery of, well, what is -- what was
13 her reputation before Kirkland allegedly harmed it?

14 THE COURT: I see. Okay. Well, I would like to
15 give Plaintiffs some time to respond. We're still dealing
16 with category one right now. We'll turn to the other
17 categories later.

18 But let me hear from Plaintiff's counsel for your
19 arguments with respect to category one.

20 MR. RAHMAN: Thanks, your Honor. No, I think your
21 Honor nailed it on the head in terms of, you know, how the
22 relevant issues are, what Kirkland knew at the time it made
23 decisions, not any -- any preexisting decisions from prior
24 employers who we're not sure whether they're comparable or
25 actually what kind of work she might have done for them.

1 We're not sure what -- how they evaluated performance.
2 Basically, if -- if we did introduce, you know, these prior
3 records, we'd have to introduce -- it would essentially
4 create a -- a trial within a trial, because then we would
5 have to obviously respond to criticisms, why was she
6 criticized, was there -- what she's criticized about, were
7 there any underlying reasons for the criticisms that may not
8 be -- may put that in question.

9 So, it just opens up a huge can of worms so to speak.
10 And -- and, again, I'm -- I just don't see the relevancy in
11 any of the adverse decisions in this case what -- you know,
12 what occurred prior -- prior to her joining Kirkland and
13 Ellis.

14 And -- and, essentially, you know, she's -- she's
15 claiming she's a better -- better performer than most --
16 most comparators while she's working there. She's not
17 claiming that she had -- you know, did more trials than
18 them. She's -- she's just comparing what she did at -- at
19 Kirkland, the work she did at Kirkland compared to the work
20 that other male comparators did at Kirkland. You know, and
21 -- and, frankly, you know, again, there was no -- it wasn't
22 as if Kirkland asked her when she joined, Hey, what did you
23 do at Fish and Richardson? What did you do at -- at
24 (indiscernible), and based on that, We're going to pay you
25 this amount or we're going to classify you as the class of

1 this year. That wasn't -- that didn't happen, and we're not
2 hearing any evidence that that took place or that was ever
3 considered.

4 And, you know, I'll just stop there. If your Honor has
5 any questions that you want me to answer, I can certainly do
6 that, and I think we -- we do go into detail about these
7 issues in our -- in our briefs.

8 THE COURT: I see. As far as the six categories,
9 four and five are a little bit similar to one. So, let me
10 turn to Kirkland if you would like to address categories
11 four and five.

12 MR. LIBURT: Yes, your Honor. So -- so, I would
13 -- I would like to mention, your Honor, if I might just one
14 last thing that, you know, throughout her complaint,
15 Plaintiff alleges that the performance evaluations by
16 Kirkland were malicious, motivated by hatred or ill will,
17 and she even goes so far as to allege that no Defendant had
18 a good faith belief in the truth of any of the statements
19 included in their evaluations. That's paragraph 207.

20 And, so, I just want to say that whether prior
21 employers had any similar criticisms to any of the
22 statements in the Kirkland evaluations is directly relevant
23 to her allegations that Kirkland acted with malice or hatred
24 or ill will or had no good faith belief.

25 On -- on categories four and five, comp and benefits,

1 so, Plaintiff alleges that she has -- that Kirkland has
2 harmed her future earnings potential. And, as the Gregosian
3 case says, it's -- you know, what -- what -- what happened
4 at a prior employer is relevant to earning potential, you
5 know, what did she do, how did she perform, is -- is
6 relevant to her future prospect. It's not as if her future
7 prospects are entirely divorced from a significant part of
8 her career in terms of what skills and experiences she has.

9 So, the Fish and Paul Hastings documents are squarely
10 relevant to her allegation of harmed future earning
11 potential.

12 It's -- it's also relevant to she's alleged financial
13 and emotional distress and physical injuries. And, so, if
14 there were -- for example, if there were claims of -- if she
15 had disability claims at prior employers for ongoing
16 conditions, those would be relevant to her future earning
17 potential as well as her claims that it was Kirkland that
18 caused whatever symptoms she's alleging, and she alleges
19 certain symptoms in the complaint. So -- so, the benefits
20 -- the benefits documents would -- would show that and also,
21 of course, her -- her pay and prior employers is relevant to
22 her future earning potential as -- as well.

23 THE COURT: I have a question about the emotional
24 distress damages. From the briefing and from the second
25 amended complaint, it was hard for me to figure out what

1 exactly the alleged damages are. I couldn't tell, for
2 example, if she alleges that the discrimination or the
3 alleged discrimination and retaliation and defamation caused
4 her distress, which is something that plaintiffs in
5 employment cases often allege, or whether it was something
6 more serious than that that amounted or a disability or
7 required medical treatment, and Kirkland's desire to get
8 prior medical documents seems like it would be stronger or
9 more justified if the emotional distress claim actually
10 relates to a medical condition or something similar to it,
11 but it would seem to be more attenuated if it's -- she's
12 just claiming the ordinary level of distress that a
13 plaintiff who's suffered an adverse employment action would
14 experience.

15 Do you have any insight into what type of distress -- I
16 mean, maybe you don't if you haven't deposed her, but do you
17 have any insight into the level or degree of emotional
18 distress that the Plaintiff is claiming?

19 MR. LIBURT: Well, yes, your Honor. She does
20 specifically allege severe emotional distress in -- in
21 various places. She alleges severe emotional, psychological
22 and physical harm and injury. And if you look at the
23 complaint, paragraphs 206 and 222, she's -- so, she's -- she
24 uses the word "severe". She's clearly not claiming garden
25 variety, and the other reason you know that is because she

1 has an intentional infliction of an emotional distress
2 claim.

3 So, it's -- it's -- as a matter of law, in order to be
4 asserting an intentional infliction of emotional distress
5 claim, she is necessarily alleging severe and ongoing
6 emotional distress.

7 So, this -- you know, this is not -- this is simply not
8 as pled, a just garden variety, you know, normal run of the
9 mill distress. She's gone out of her way to allege both --
10 to assert an IIED claim and to specifically allege severe
11 emotional distress. And she -- so, that's the answer.

12 THE COURT: Okay. On categories four and five,
13 let me hear from Plaintiff's counsel. And if you would like
14 to respond with any information that you may have about the
15 nature of the Plaintiff's emotional distress claim, that
16 would be helpful.

17 MR. RAHMAN: Sure. My understanding is that
18 Plaintiff has been in treatment, in terms of -- regarding
19 her emotional health, I believe she was seeing a therapist.
20 I'm not aware of any kind of medical diagnosis or anything
21 severe in that -- in that sense. And, you know, typically,
22 while there is -- you know, I understand there is some basis
23 for an employer to, you know, delve into or ask about, you
24 know, other stressors, again, that's usually done through a
25 deposition or maybe a discovery request, not usually fishing

1 through prior -- prior employers' records, especially where
2 there's no basis to believe or allege that there was any
3 kind of disability claim or anything of that nature.

4 In terms of compensation, I mean, I don't -- I don't
5 see how whatever information Kirk -- I guess Kirkland was
6 asking for what she was paid at -- at the employers, which
7 we could certainly provide through a W-2 form. That
8 shouldn't be an issue.

9 But then when you get into other issues about, you
10 know, trying to find out about, you know, comparing her pay
11 at that -- those employers to other individuals there,
12 again, we're just creating this whole separate side show
13 which, again, if the issue is how much was she paid prior to
14 -- prior to Kirkland, was she paid at -- was she paid at
15 Kirkland and what is her earning potential, that -- that
16 potentially will be provided through a W-2 form. It doesn't
17 require, you know, a subpoena from prior -- from prior
18 employer. So, that's how I'd respond to those, those two
19 requests. (Telephonic glitch.)

20 THE COURT: And then let me turn to Kirkland for
21 the -- the remaining categories, two of which are the
22 investigations, and then there's the medical documents. So,
23 categories two, three, and six.

24 MR. LIBURT: Thank you, your Honor.

25 Yeah, I would note that we did serve an interrogatory

1 asking about treatment, and we got back nothing, but where I
2 -- I strongly disagree with counsel's argument that somehow
3 we are limited to obtaining information only through the
4 Plaintiff as opposed to obtaining information from neutral
5 third parties, and as to -- you know, there's -- there's a
6 -- there's a serious due process issue with allowing
7 Plaintiff to make various assertions that she's making and
8 Kirkland's -- you know, if Kirkland is not allowed to engage
9 in third party discovery to test these assertions.

10 As to, let's see, category two, so, that's leaves of
11 absence, medical restrictions, disabilities, et cetera, I
12 think that's similar to what we've just been discussing,
13 your Honor. She -- again, she's claiming severe emotional,
14 psychological, physical harm and injury. And to the extent
15 that such documents would show alternative stressors or
16 preexisting conditions that would impact emotional distress
17 or physical harm or injury, Kirkland's entitled to those.

18 I mean, I would note that it's all -- you know, these
19 aren't -- you know, we have not yet crossed the bridge of --
20 of subpoenaing actual medical providers here, and I -- I
21 heard -- I think I heard counsel say that he's not aware of
22 any. But, regardless, you know, this is -- this is -- you
23 know, this is a prior -- these are prior employers.

24 So, other -- frankly, other than having benefits
25 documents and potentially leave or -- or leave requests

1 relating to disabilities, you know, it's presumably a
2 limited universe. We don't know, but so that's category
3 two.

4 Category -- so, categories three and six -- so, that's
5 basically complaints, investigations or litigation against
6 former employers, and, to be clear, Kirkland's not seeking
7 privileged documents from -- from these prior inquiries.
8 For example, we're not seeking -- we're not seeking work
9 product on cases that Plaintiff worked on. I just want to
10 make that very clear. That's not what we're asking for.

11 What we're asking for is basically whether Plaintiff
12 made similar complaints to what's in the lawsuit against
13 Kirkland, was she claiming discrimination or retaliation or
14 harassment or intentional infliction of emotional distress
15 or defamation, did she make such complaints, were there any
16 investigations, what were the outcome of the investigations,
17 did she -- did she sue any prior employers or threaten to
18 sue prior employers relating to similar claims and that such
19 -- such evidence would -- although -- would potentially be
20 admissible under Federal Rule of Evidence 404(b) and/or 406,
21 but, of course, in discovery, admissibility is not the test,
22 but that's where it would ultimately be going, but this is
23 discovery, and I'm aware -- we're aware that Plaintiff
24 argues that this is nothing but character evidence. It's
25 not character evidence. It's for the reasons that we said

1 that's not character evidence. Although I do note that
2 Plaintiff has actually placed her character in issue because
3 she actually alleges harm to her character in paragraphs 265
4 and 291.

5 So -- so, you know, she does that. But, like I said,
6 this is -- this is 404(b) and 406 evidence rather than
7 inadmissible character evidence.

8 THE COURT: One question I have about topics -- or
9 categories three and six is that there doesn't --

10 MR. LIBURT: Yes.

11 THE COURT: -- seem to be a subject matter
12 limitation. So, just to make up some hypotheticals, if the
13 Plaintiff had a divorce proceeding that the employer knew
14 about or had information about or if she filed a complaint
15 with OSHA that the floor was slippery, it would seem like
16 the subpoenas would sweep in those things as well or really
17 any complaint about anything. Is that right?

18 MR. LIBURT: That is accurate, your Honor. As
19 drafted, these categories would sweep that in. You know, as
20 I said, the main -- I mean, you know, if she -- if she did
21 have a divorce proceeding, then certainly that would likely
22 be relevant to her emotional distress allegations and
23 alternative stressors and so on and so forth.

24 But the -- certainly, the -- the primary thrust of
25 these categories is -- is what I just mentioned.

1 THE COURT: Okay. Thank you. Understood.

2 Plaintiff's counsel, would you like to respond
3 concerning categories two, three, and six?

4 MR. RAHMAN: Sure. As -- as to three and six, I
5 mean, we -- to us, that's clearly propensity evidence that
6 -- that is inadmissible. And, again, there's been no
7 showing or any evidence or any proof or anything to infer
8 you then that there's -- that these type of documents may
9 exist. Again, this is, again, just clearly to us a fishing
10 expedition, and -- and it is, like your Honor said, very
11 broad. It encompasses, you know, any type of litigation.
12 And it's not even clear specifically, you know. It says
13 involving Plaintiffs, but what does that even mean? Does
14 she have to be party? Its just indecipherable, frankly,
15 which is another reason why it should be quashed. And, so
16 -- so, I think three and six, again, are improper. And,
17 again, for category two, similarly, again, no showing
18 whatsoever that there weren't prior leaves of absences or
19 anything taken by -- of that nature taken by Plaintiff at
20 her prior employers. And, again, if -- if there's -- you
21 know, while there's, of course, you know, some leeway that
22 employers have to look -- to ask about other structures or
23 other causes of emotional distress, it doesn't give
24 employers unfettered -- just because she alleges, you know,
25 emotional distress doesn't give an employer -- you know,

1 again, like your Honor said, you know, it's pled in
2 virtually every employment case, you know, unfettered access
3 to prior employment records. So, again, we think two is
4 improper as well.

5 THE COURT: Okay. Well, thank you, Counsel.

6 Kirkland, let me turn to you. Are there any other
7 points that you wanted to make at this hearing that so far
8 you have not gotten to?

9 MR. LIBURT: Yes. Thank you, your Honor. So,
10 regarding -- regarding Plaintiff's alleged privacy, I do
11 want to note that there will be a protective order in the
12 case, and lots of cases have held that a protective order is
13 adequate to address any privacy issues.

14 And I -- I want to reiterate that in -- as we all read
15 the various cases that the parties have cited in this
16 briefing, what comes through loud and clear is that what's
17 discoverable is really tied quite directly to what are the
18 claims and what are the defenses in the particular case, and
19 so in this case, this is not one of those cases, for
20 example, that Plaintiff cited where it's a wage and hour
21 case or where -- or, for example, where the subpoena to a
22 former employer was, you know, solely relating to
23 credibility or there are several cases where it was a
24 defense of after acquired evidence or something like that,
25 and the courts took, you know, a fairly dim view of those as

1 the bases.

2 This is a case where Plaintiff has placed in issue her
3 prior employment records because of the claims she's
4 alleged, the -- the equal pay claim and what's necessary to
5 prove or disprove that claim, the discrimination and the
6 retaliation claims, the defamation claim, what is necessary
7 to prove and disprove the elements of those claims. And --
8 and Kirkland is entitled to a fair due process ability to
9 discovery that is potentially going to rebut the assertions
10 that she is making. And, so -- so, I -- so, Defendant's
11 request that the Court deny the motion. If -- if the Court
12 is inclined to grant the motion to some extent, then I would
13 ask that that be without prejudice to Kirkland serving
14 subpoenas later after further discovery if that is
15 appropriate.

16 Thank you.

17 THE COURT: All right. Thank you, Counsel.

18 Plaintiff's counsel, let me turn to you. Are there any
19 points that you wish to make that you haven't gotten to or
20 any responses that you would like to make to what Kirkland
21 just said?

22 MR. RAHMAN: Thank you, your Honor. The only
23 thing I would like to add is, you know, again, if -- if --
24 if the -- the standard was that any time an employee
25 (telephonic glitch) into issue their performance or

1 (indiscernible) an Equal Pay Act, that that opens up
2 discovery into prior employers, that would have a huge, you
3 know, chilling effect on -- on these kinds of cases in terms
4 of Plaintiffs. It just can't be the standard. There's got
5 to be some -- some showing. And I think, frankly, counsel's
6 acknowledging that -- that there's no basis by -- by noting
7 that, you know -- that perhaps there's a -- there should be
8 a without prejudice ruling where the -- where this can be
9 reraised, which, you know, I think is -- you know, it makes
10 more sense than issuing a subpoena at this -- at this
11 junction -- juncture when there's no basis for any -- to
12 conclude there's anything relevant or responsive of the
13 files of Plaintiff's prior employers.

14 So, your Honor, you know, again, we -- as we laid out
15 in our -- in our brief, we believe that the improper
16 harassing meant to annoy subpoenas and should be -- and
17 should be quashed.

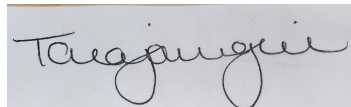
18 THE COURT: Thank you, Counsel. I appreciate the
19 arguments from both sides. I will issue a written order on
20 the motion. And, with that, we're adjourned for the day.

21 (Proceedings adjourned at 10:55 a.m.)
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CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U.S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.

A rectangular box containing a handwritten signature in cursive script, which appears to read "Taraungie".

Echo Reporting, Inc., Transcriber

Friday, February 23, 2024